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Before the **FEDERAL COMMUNICATIONS COMMISSION** Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of) MM DOCKET NO. 93-75
TRINITY BROADCASTING OF FLORIDA, INC.)) File No. BRCT-911001LY
For Renewal of License of Station WHFT(TV) (Channel 45), Miami, Florida)))
GLENDALE BROADCASTING COMPANY) File No. BPCT-911227KE
For a Construction Permit for)
a New TV Station on Channel 45)
at Miami, Florida)

To: The Commission

MASS MEDIA BUREAU'S OPPOSITION TO MOTION TO VACATE THE RECORD ON IMPROVIDENTLY DESIGNATED ISSUES

Roy J. Stewart Chief, Mass Media Bureau

Norman Goldstein Chief, Complaints/Political Programming Branch

James W. Shook Attorney Mass Media Bureau

Federal Communications Commission 2025 M Street, N.W., Suite 7212 Washington, D.C. 20554 (202) 418-1430

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Summary

This case is pending before the Commission on exceptions to an Initial Decision, 10 FCC Rcd 12020 (ALJ 1995) ("ID"), which denies the application of Trinity Broadcasting of Florida, Inc. ("TBF") for renewal of license for Station WHFT(TV), Miami, Florida, and which grants the mutually exclusive application of Glendale Broadcasting Company ("Glendale") for a new television station in Miami. In concluding that the WHFT(TV) applications warranted denial, the ID found that Trinity Broadcasting Network (along with TBF hereafter referred to as "Trinity") violated the Commission's multiple ownership rules and abused the Commission's processes by exercising *de facto* control over an entity now known as National Minority TV, Inc. ("NMTV"). In various applications, NMTV represented that it was a "minority controlled" entity. However, the evidence in this proceeding has established that NMTV was under Trinity's control. Trinity is not minority controlled.

Trinity's motion seeks a Commission order which sets aside the basic qualifications issues concerning Trinity, vacates the record on those issues, and grants the WHFT(TV) renewal application. Trinity argues that the basic qualifying issues concerning itself, namely, the *de facto* control and abuse of process issues, should never have been designated. Trinity sets forth the history that led to the 1983 adoption of the rules granting preferences for applicants in the low power television service and the 1985 rule creating the "minority controlled" exception to the national multiple ownership rules for full power commercial broadcast stations. In light of that history, Trinity argues that when the Commission adopted the noted rules, the Commission intended that minorities need not have operating control of

the stations in order to claim the preference or to qualify for the minority controlled exception.

Because the Bureau has consistently advocated that Trinity did not abuse the Commission's processes with respect to NMTV's claims of preferences for low power television station construction permit applications, the Bureau will not address Trinity's motion insofar as it addresses abuse of the low power rules. However, the Bureau opposes Trinity's motion with respect to its arguments concerning the national multiple ownership rules. We continue to believe that with regard to these rules Trinity abused the Commission's processes, that the abuses occurred because of deception, and that loss of the Miami license is warranted.

The Bureau submits that the Commission intended that minorities not only have *de jure* but also *de facto* control of full power stations to qualify for the minority controlled exception. The Bureau acknowledges that non minorities could hold "cognizable" interests in such stations and that, in other contexts, such interests are viewed by the Commission as controlling. However, the Commission's clear intent in allowing a non minority entity to have a cognizable interest in up to 14 full power commercial stations (the ordinary limit was 12 stations), provided at least two were minority controlled, was to allow non minorities to assist or support stations that were minority controlled. While such assistance could be significant, the minorities who were nominally in control were also required to remain in control as a practical matter. Minorities were to retain control in order to foster the policy of

diversity, which could not be advanced if minorities did not exercise *de facto* control. Thus, it is the Bureau's contention that Trinity's position is in error and that its motion should be denied.

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To: The Commission

MASS MEDIA BUREAU'S OPPOSITION TO MOTION TO VACATE THE RECORD ON IMPROVIDENTLY DESIGNATED ISSUES

1. On August 20, 1996, Trinity Broadcasting of Florida, Inc. and Trinity Broadcasting Network ("Trinity") filed a "Motion to Vacate the Record on Improvidently Designated Issues." On August 28, 1996, a consent motion for extension of time were filed by Glendale Broadcasting Company ("Glendale") and Spanish American League Against Discrimination. That motion requested extension of the filing date for responding to Trinity's motion to September 30, 1996. Further, on September 23 and September 30, 1996, Glendale filed motions to extend the response date to October 15, 1996. Finally, on October 11, 1996, Glendale filed a motion to extend the response date to October 25, 1996. The Mass Media

Bureau hereby submits its opposition to Trinity's motion.

Background

- 2. Trinity requests that the Commission issue an order that sets aside the basic qualifications issues concerning Trinity, vacates the record on those issues, and grants the WHFT(TV) renewal application. The issues Trinity wants vacated involve alleged *de facto* control by Trinity or its agents over National Minority TV, Inc. ("NMTV") and alleged abuse of process by Trinity or its agents through use of NMTV to evade multiple ownership limitations and/or to improperly claim minority preferences in low power television ("lptv") applications. See Hearing Designation Order, 8 FCC Rcd 2475 (1993) ("HDO").
- 3. In the <u>Initial Decision</u> in this proceeding, 10 FCC Rcd 12020 (ALJ 1995) ("<u>ID</u>"), the issues referenced above were decided against Trinity. Specifically, the <u>ID</u> determined that Trinity had exercised *de facto* control over NMTV and that Trinity had abused the Commission processes through its use of NMTV. <u>ID</u> at 12060. The <u>ID</u> further concluded that Trinity's abuse occurred because of intentional deception. <u>ID</u> at 12061-62. Accordingly, the <u>ID</u> denied the WHFT(TV) renewal application.
- 4. All parties filed exceptions and reply briefs pursuant to Sections 1.276 and 1.277 of the Commission's Rules. Trinity's exceptions as to the issues concerning its application focused, *inter alia*, on whether Paul F. Crouch, Trinity's and NMTV's president intended to deceive the Commission. According to Trinity, the evidence established that Crouch at all

times acted in good faith and upon reliance of communications counsel, Colby May, and that, if mistakes were made, they were not the product of bad faith. In addition, Trinity contended that, in any event, Crouch and Trinity did not exercise *de facto* control over NMTV.

Although the Bureau had initially supported renewal of Trinity's license notwithstanding Trinity's *de facto* control of NMTV and abuse of process, we opted not to except to the <u>ID's</u> conclusion that Trinity's license renewal application warranted denial. In its reply brief, Trinity attacked the standard of review we employed to justify support of the <u>ID</u>.

- 5. In the Bureau's reply brief, we explained why the <u>ID</u> should be affirmed. We contended that the evidence supported an inference that both Crouch and May knew that Section 73.3555 of the Commission's Rules required that the minorities on NMTV's board of directors have both *de jure* and *de facto* control of the licensee in order for Crouch to hold a cognizable interest in NMTV's full power television stations. We further contended that, by failing to disclose *in the applications themselves* the full extent of the Trinity/NMTV relationship, the evidence supported a conclusion that the abuse of process that occurred resulted from a lack of candor on the part of both Crouch and May.
- 6. Although no further pleadings are contemplated by the rules, Trinity has filed the instant pleading. Trinity justifies its filing by contending that "dramatic" and "compelling" new information demonstrates that the *de facto* control and abuse of process issues should not have been designated. Trinity also urges that, because it had no right to challenge the <u>HDO</u> before the Presiding Administrative Law Judge or the Review Board, it should now be

allowed to do so. Considering the demise of the Review Board and the arguable inability to raise earlier the matters Trinity now wishes the Commission to consider, the Bureau has no objection to the Commission resolving the issues raised by Trinity in the context of a comprehensive order which disposes of all pending matters.

Trinity's Position

7. When distilled, Trinity's pleading contains only one new argument that warrants a response. Specifically, Trinity argues that the HDO erred in holding that the minority control exception to the multiple ownership rules precludes looking beyond mere legal ownership of a licensee. See HDO, 8 FCC Rcd at 2477 (¶ 14) and 2480 (¶ 37). Trinity contends that the plain wording of the exception, as well as the Commission's intent at the time of the exception's adoption, was that minority ownership in excess of 50%, without regard to actual minority control of the licensee or the broadcast station, would qualify a party to hold one or two cognizable interests over and above the ordinary limit. Thus, Trinity concludes that, so long as NMTV was more than 50% owned by minorities,² the question of who actually controlled NMTV was irrelevant and the *de facto* control and abuse of process issues should never have been specified.

¹ The Bureau is not addressing herein Trinity's arguments to the extent they address the factual questions of whether an abuse of process occurred and whether such abuse occurred because of deceit -- both of which were fully addressed in the <u>ID</u> and have been fully briefed by all the parties in their exceptions and replies thereto. The Bureau is also not addressing Trinity's arguments concerning the abuse of process issue as it pertains to NMTV's construction permit applications for low power television stations. After careful consideration of the entire record, the Bureau has repeatedly advocated that no such abuse occurred.

² As a nonstock corporation, NMTV is "owned" by its board of directors. At all relevant times, NMTV had either three or four directors, a majority of whom have always been members of minority groups.

- 8. Trinity contends that, when the Commission proposed to amend the multiple ownership rules in 1983, the Commission made no specific proposals to enhance minority ownership and reaffirmed that cognizable interests could be controlling. In this regard, Trinity points to the Commission's observation that under the multiple ownership rules attributable or cognizable interests "are generally treated as though they were controlling interests." Multiple Ownership of B/c Stations, 95 FCC 2d 360, 395 (1983) ("Multiple Ownership NPRM"). Trinity also views as significant the Commission's observation that its policy of treating various interests such as those of officers and directors as cognizable was consistent with "the realities of business organization and control" given that, in many organizations, "the actual day to day control is in the hands of officers and directors who are not necessarily owners or stockholders." Multiple Ownership NPRM, 95 FCC 2d at 366 n.
- 9. Trinity next recounts that in <u>Amendment of Section 73.3555</u>, 100 FCC 2d 17 (1984) ("<u>Report and Order</u>"), the Commission decreed that specific incentives to enhance minority ownership should not be part of the multiple ownership rules. <u>Report and Order</u>, 100 FCC 2d at 49. Moreover, Trinity observes, the Commission chose not to consider audience reach in determining how many stations any one person or entity could own. <u>See Report and Order</u>, 100 FCC 2d at 57, 61, 64.
- 10. Trinity relates that upon release of the <u>Report and Order</u> Congressional reaction included proposals to mandate ownership limits based on audience reach and a specific

incentive in the multiple ownership rules to increase minority ownership. Trinity notes that the minority ownership proposals defined minority controlled stations as those where minorities owned at least 50% of the station. In addition, Trinity observes that Congress temporarily prohibited the Commission from spending funds to implement the proposed interim 12 station limit for television. Thus, according to Trinity, Congress strongly disapproved of the Commission's refusal to adopt audience reach limits and minority incentives in the new multiple ownership rules.

11. Trinity relates that, several months later, the Commission reconsidered the Report and Order. Amendment of Section 73.3555, 100 FCC 2d 74 (1985) ("Reconsideration Order"). Trinity notes that therein the Commission explicitly recognized that it employed

"different standards of minority control depending on the mechanism used to foster its minority policies. In the context of multiple ownership policies, we believe that a greater than 50 percent minority ownership interest is an appropriate and meaningful standard for permitting increases to the rules adopted herein."

Reconsideration Order, 100 FCC 2d at 95. Trinity states that, as with the low power television lottery preference (see Random Selection Lotteries, 93 FCC 2d 952, 976-77 (1983) ("Lotteries")), the Commission stated no requirement that the minority owners have operating control in order for the minority exception to apply. Trinity contrasts this with a later definition of minority controlled where the Commission explicitly required members of minority groups to have both *de jure* and *de facto* control of an entity, citing Implementation of Section 309(j) - Competitive Bidding, 10 FCC Rcd 403, 493 (1994).

12. Trinity further contends that, at the meeting at which the Reconsideration Order was adopted, Commissioner Quello noted that the Commission should "take some kind of congnizance" that the Reconsideration Order considered proposals introduced by Congress,3 while Commissioner (later Chairman) Patrick dissented in part because, he claimed, the "majority's scheme ... [gave no concern] as to whether the 51% minority owners will exert any influence whatsoever on the station's programming or will have any control at all."4 Trinity then notes that Chairman Fowler stated that he agreed with Commissioner Patrick's comments. Trinity claims that Commissioner Rivera did not dispute Commissioner Patrick's assessment as to what the new rules required but only took issue with the argument that the multiple ownership rules were an inappropriate means of advancing minority ownership. Finally, Trinity notes that when the Reconsideration Order was released, no one disputed Commissioner Patrick's partial dissent where he repeated his concern about the "majority's scheme." Reconsideration Order, 100 FCC 2d at 104. In Trinity's view, this is significant because, it contends, a statutory construction stated in a separate or dissenting opinion which is undisputed by the majority will be taken to reflect the view of the majority as well, citing Redgrave v. Boston Symphony Orchestra, 855 F.2d 888, 908 (1st Cir. 1988) and Schedule of Fees, 50 FCC 2d 906, 907-08 (1975).

13. Trinity next points to the Commission's Notice of Proposed Rulemaking in

³ Indeed, footnote 45 of the <u>Reconsideration Order</u> cites to the proposed legislation with respect to the proposal to include audience reach limits.

These views were repeated in his separate statement which dissented in part. See Reconsideration Order, 100 FCC 2d at 104.

Reexamination of the "Single Majority Stockholder" and "Minority Incentive" Provisions of Section 73.3555 of the Commission's Rules and Regulations, FCC 85-303, released July 1, 1985, 50 Fed. Reg. 27629 (July 5, 1985) ("Reexamination of Section 73.3555 Provisions"). According to Trinity, that document conclusively establishes that minority ownership alone was all that was necessary to qualify for the minority controlled exception to the minority ownership rules. In this regard, Trinity claims that, because the Commission distinguished between the holding of voting stock (single majority stockholder) and the holding of equity interests (minority exception), the Commission understood that the minority exception was based on aggregate equity ownership without regard to operating control. See Reexamination of Section 73.3555 Provisions, at para. 6. Further, Trinity points to comments filed by The Washington Post, which asserted that the minority incentive provisions had an independent attraction for investors wishing to be active in the broadcast industry because those provisions allowed the acquisition of control of 14 stations if at least two are minority controlled. Trinity contends that, because the HDO did not consider the pertinent history preceding and immediately following the Reconsideration Order, the Commission improvidently added the de facto control and abuse of process issues as to Trinity.

14. Trinity next argues that, in any event, a holder of a cognizable interest may exercise *de facto* control. Trinity points to a Commission statement which defines "cognizable" interests as those that convey to the holder the "ability to materially influence or control the business affairs of our licensees." See, e.g., Reexamination of Section 73.3555

Provisions, at para. 2. Likewise, Trinity notes that the Commission's policy is to generally

that "actual day to day control" of licensees "is in the hands of officers and directors who are not necessarily owners or stockholders." Multiple Ownership NPRM, 95 FCC 2d at 366 n.

26. Trinity therefore reasons that, in permitting broadcasters to hold cognizable interests in minority controlled stations, the Commission contemplated that those broadcasters could have actual day to day control of such stations.

15. Moreover, Trinity claims that the Commission made clear that the rationale for attributing cognizable interests was that the holder of such an interest could control the licensee, citing Notice of Proposed Rulemaking, FCC 83-46, released February 15, 1983, 48 Fed. Reg. 10082 (March 10, 1983). Likewise, when the Commission amended the attribution benchmarks, Trinity insists that the Commission adopted a rebuttable presumption that any cognizable interest was controlling. In this regard, Trinity notes that the Commission stated that, in order to overcome the presumption, the proponent would have to establish that another person or persons were in indisputable control of the licensee. See Attribution of Ownership Interests, 97 FCC 2d 997, 1010-11 (1984) ("Attribution"). Trinity reasons that because the attribution rules presume that any cognizable interest is a controlling interest, the Commission necessarily authorizes any holder of such an interest to exercise actual working control of the licensee. In this regard, Trinity notes that in Metromedia, Inc., 98 FCC 2d 300 (1984), the Commission permitted John Kluge, then Metromedia's president and a minority shareholder, to file a short form application to obtain de jure control of the company. Trinity observes that the Commission found that Kluge had exercised de facto control of Metromedia and that it granted the application because the company, under Kluge's *de facto* control, had had its qualifications approved in connection with long form applications. Trinity argues that the Commission found acceptable Kluge's exercise of *de facto* control because his cognizable interest had previously been approved, and it submits that Trinity and Crouch should be accorded the same treatment.

- 16. Considering the foregoing, Trinity argues that the <u>HDO</u> misapplied the Commission's *de facto* control policy by failing to recognize that the policy does not prohibit the exercise of actual working control by the authorized holder of a cognizable interest. Trinity continues that the <u>HDO</u> also seriously erred by failing to consider the meaning of the incentive embodied in the minority controlled provision of the multiple ownership rules. Trinity suggests that the incentive was that the investor or participant in a minority controlled station could actually control it. Thus, when the Commission granted NMTV's applications which clearly stated that Crouch was NMTV's president, it authorized Crouch to exercise actual working control of NMTV. Accordingly, Trinity insists, the <u>HDO</u> plainly erred in concluding that, if Crouch exercised *de facto* control, he did so unlawfully.
- 17. Trinity also faults the <u>HDO</u> for relying on inapposite cases. In Trinity's opinion, the cases cited in the <u>HDO</u> either had no bearing on the multiple ownership rules' minority control policy or post-dated NMTV's applications, thereby giving Trinity no notice of the requirements at issue. Trinity particularly faults the <u>HDO's</u> reliance on <u>Metro Broadcasting</u>, <u>Inc. v. FCC</u>, 497 U.S. 547 (1990) ("<u>Metro</u>"). Trinity insists that <u>Metro</u> did not hold that *de*

facto control by minorities was required or necessary to achieve program diversity. On the contrary, Trinity insists that Metro accepted and endorsed Congress' determination that a nexus existed between minority ownership per se and program diversity. Moreover, Trinity contends that the Commission's own position in the litigation recognized that operating control by minorities was not a prerequisite to achieving the diversity goals of minority ownership policies. Instead, according to Trinity, the Commission repeatedly emphasized the importance of mere ownership.

- 18. Trinity further argues that the <u>HDO</u> overlooked the obvious meaning and construction of the multiple ownership rules' minority controlled exception. Trinity observes that a principle of statutory construction is that "a definition that declares what a term 'means' ... excludes any meaning that is not stated," quoting <u>Colautti v. Franklin</u>, 439 U.S. 379, 382 n.10 (1979). Trinity submits that, because the definition of minority controlled states that minority controlled means more than 50 percent owned by minorities, designation of a *de facto* control issue was irreconcilable with the only permissible meaning of the rule. Finally, Trinity finds it significant that the Commission did not rely on Section 73.3555 Note 1's definition of control in the <u>HDO</u>, the <u>Reconsideration Order</u>, or the <u>Reexamination of Section 73.3555 Provisions</u>. Trinity contends that the Commission placed no reliance on that note because its definition of control was irrelevant to the special definition of minority controlled adopted for the minority ownership exception.
 - 19. Finally, Trinity contends that its treatment cannot be reconciled with the decisions

in Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995), recon. denied, 11 FCC Rcd 7773 (1996) ("Fox") and Roy M. Speer, FCC 96-89, released March 11, 1996 and FCC 96-258, released June 14, 1996 ("Speer"). Trinity submits that, in those cases, licensees were absolved of intentional wrongdoing because the law allegedly violated was not entirely clear at the time and a reasonable licensee would not necessarily have made the same interpretation ultimately made by the Commission. Trinity contends that the law at issue here was also unsettled and that published authority would not have compelled a reasonable applicant to conclude that *de facto* control was necessary. In this regard, Trinity insists that the Bureau's position in 1987, when NMTV's first application was granted, differs from its present interpretation in that the Bureau's only concern in 1987 was whether NMTV was legally "owned" by minorities.

Mass Media Bureau's Position

- 20. As noted, the question to be decided is whether the minority exception to the multiple ownership rules required that minorities have *de facto* control as well as the requisite ownership interests. The Bureau contends this question should be answered in the affirmative.
- 21. The Bureau submits that, in attempting to ascertain what the Commission intended with respect to the multiple ownership rules, it is instructive to examine what the Commission did when it adopted rules to implement a system of lotteries to choose low power television licensees from among competing applicants. In Lotteries, 93 FCC 2d at

1007, the Commission decided to award a 2 to 1 preference to "[a]pplicants, more than 50% of whose ownership interests are held by members of minority groups." Likewise, the Commission's new rules would award a 2 to 1 preference to "[a]pplicants whose owners in the aggregate hold more than 50% of the ownership interests in no other media of mass communications," and a 1.5 to 1 preference to "[alpplicants whose owners in the aggregate hold more than 50% of the ownership interest in one, two or three other media of mass communications." <u>Id.</u> In determining the requisite level of "ownership," the Commission took its cue from Congress and determined that, in computing the amount of ownership, limited partnership interests and interests of trust beneficiaries would be included. Lotteries, 93 FCC 2d at 976-77. In addition, as Trinity notes, the mechanism for determining minority ownership in corporations with more than 50 shareholders would measure passive as well as active ownership interests. Id. at 977. Therefore, one could have concluded that, for a low power television preference, the Commission was concerned only about ownership interests and not control. Indeed, the word "control" does not appear in the discussion or rules for the awarding of low power television preferences. That the Commission would grant preferences to low power television applicants for attaining specified levels of ownership without regard to the possibility that persons not entitled to the preferences would actually control the applicant was entirely consistent with a "secondary, basically unregulated LPTV service." Lotteries, 93 FCC 2d at 975.5

In this regard, the Bureau observes that, prior to <u>Lotteries</u>, the low power television service did not even have formal ownership and attribution rules. <u>See Notice of Proposed Rulemaking</u>, FCC 83-46 at para. 19.

- 22. Unlike its treatment of the low power television service, however, the Commission has traditionally imposed numerical limits on the number of stations that any one entity or person may own and control in the full power commercial television service. See Amendment of Sections 3.35, 3.240 and 3.636, 18 FCC 288 (1953). Moreover, to ensure the efficacy of the limitations, the Commission has treated as a controlling interest all interests that have the *potential* to materially influence the operation of the station. Attribution, 97 FCC 2d at 999; Reexamination of Section 73.3555 Provisions, at para. 9. One of the stated premises underlying limitations on national ownership was the belief that such limits furthered the goal of diversity of information sources. Multiple Ownership NPRM, 95 FCC 2d at 363, 383. Another was that such limitations prevented undue economic concentration.

 Reconsideration Order, 100 FCC 2d at 88. See also, Amendment of Sections 3.35, 3.240 and 3.636, 18 FCC at 292-93.
- 23. Against this background, and in the wake of Congressional efforts to use the multiple ownership rules to create additional opportunities for minorities in broadcasting, the Commission determined in 1985 to include "a minority incentive" to further promote minority ownership in television. Specifically, the Commission decided to allow a holder of a "cognizable interest" to have such an interest in as many as 14 full power commercial television stations so long as at least two such stations were "minority controlled."

 Reconsideration Order, 100 FCC 2d at 94. In determining how to define "minority

⁶ A cognizable interest is that ownership interest in or relation to a licensee conferring on its holder that degree of influence or control over the licensee and its facilities which is subject to limitation by the multiple ownership rules. Attribution, 97 FCC 2d at 999.

controlled" for the purpose of deciding whether to grant a particular application, the Commission stated the following:

46. A question arises as to the proper definition of a minority owned station for the purposes of our multiple ownership rules. In this regard, we note that the Commission has adopted different standards of minority control depending on the mechanism used to foster its minority policies. [fn omitted] In the context of the multiple ownership policies, we believe that a greater than 50 percent minority ownership interest is an appropriate and meaningful standard for permitting increases to the rules adopted herein. [fn omitted]

Amendment of Section 73.3555, 100 FCC 2d at 95.

- 24. The foregoing definition, which was used in the rule, was to guide applicants and the Commission's staff as to what circumstances would justify a grant; namely, that minorities would have *de jure* control of the proposed licensee. The definition focused only on *de jure* control because it was anticipated that a grant to an applicant under the *de jure* control of minorities would, sooner or later, result in operations that reflected the views of the minorities who owned the stations. See Minority Ownership in B/cing, 92 FCC 2d 849, 850, 853 (1982) and Minority Ownership of B/c Facilities, 68 FCC 2d 979, 980-81 (1978), cited in Amendment of Section 73.3555, 100 FCC 2d at 94 n. 57. See also, Commissioner Rivera's statement upon the adoption of the minority controlled exception appearing as Attachment 3 of Trinity's instant motion at pp. 11-12. Thus, there was no need for the Commission to require more *in the application* to acquire a minority controlled station.
 - 25. Contrary to Trinity's contention, neither Commissioner Patrick's statement at the

Commission meeting where the new rules were adopted, nor his partial dissent upon their release, opened the door to applicants that were not, in fact, minority controlled.

Commissioner Patrick criticized the new rules because an applicant only had to demonstrate de jure control by minorities at the time the grant of the application was sought. In Commissioner Patrick's view, the Commission's new rule should have also required that the applicant explicitly establish that grant of the application would advance the policy underlying the rule; namely, diversity. One can infer from Commissioner Patrick's criticism that he believed that the hurdle imposed by the new rule was not high enough and that limiting the showing to a demonstration of de jure control by minorities in the application would encourage abusive filings. However, Commissioner Patrick never states that an applicant that is not in fact minority controlled should be able to acquire a 13th or 14th television station.

26. Moreover, unlike the Commission's clear expression of intent in Lotteries, 93 FCC 2d at 976-77, that minority ownership warranting a preference did not have to give minorities *de jure*, much less *de facto*, control, the Commission did *not* state or suggest that minority ownership of limited partnership interests or beneficial interests in a trust would be relevant in determining whether an applicant was minority controlled for purposes of the multiple ownership rules. Rather, the Commission stated that the additional stations in which group owners could hold interests in excess of the normal ceiling were to be "minority controlled." Amendment of Section 73.3555, 100 FCC 2d at 94. While the Commission certainly could have explicitly required that minority group members have both *de jure* and *de facto* control of an entity as it did in Implementation of Section 309(j) - Competitive

Bidding, 10 FCC Rcd 403, 493 (1994), its failure to do so in the context of the multiple ownership rules did not give any applicant not controlled by minorities a green light to masquerade as a minority controlled entity.

- 27. Likewise, the Bureau disputes that Reexamination of Section 73.3555 Provisions established or even suggested that an applicant's minority ownership, without minority control, was all that was necessary for the applicant to qualify as a minority controlled entity. Indeed, the Commission clearly expressed its belief that minorities were to control the extra stations. Specifically, the Commission stated that its "intention, of course, in permitting increased levels of multiple ownership only where minority-controlled stations are involved is to encourage investment in and support for these stations..." Reexamination of Section 73.3555 Provisions, para. 5. This statement, coming five months after release of Amendment of Section 73.3555, plainly indicates that the interests non-minorities could acquire in "minority controlled" stations were not to be controlling. In short, non-minorities could hold cognizable interests and become officers, directors and/or stockholders in minority controlled stations in order to assist and support those stations, not to control them. Trinity's argument to the contrary and its reliance upon The Washington Post's assertion in its comments in Reexamination of Section 73.3555 Provisions that non-minorities may actually control the minority controlled stations are misplaced.
- 28. Thus, in the context of the minority controlled exception to the multiple ownership rules, a cognizable interest held by a non-minority could not be controlling. Such

an interest could be an influential one. It could be an interest that would allow the non-minority to protect his investment and provide guidance. It could be an interest which, in most other contexts, could be presumed to be potentially controlling, and in the context of a minority controlled entity, so influential as to warrant inclusion in a determination of the total number of cognizable interests held by such a person. However, the grant of the extra interests was made only because minorities were to control of those stations.

- 29. Thus, Trinity's reliance on Metromedia, Inc. is misplaced because the issue there did not involve the multiple ownership rules.⁷ Further, Trinity is incorrect that the HDO erred by concluding that, if Paul Crouch exercised *de facto* control, he did so unlawfully. The grants for acquisition of full power television stations were to have been to a minority controlled NMTV, not to Trinity or Paul Crouch. Thus, the policy of allowing a person such as Crouch to hold cognizable interests in up to 14 stations was abused because the actual control of NMTV belonged with Trinity's officers and directors, including Crouch, all of whom were non-minorities.
- 30. Moreover, Trinity's criticism that the <u>HDO</u> relied upon inapposite cases misses the mark. Although the cases cited in para. 13 of the <u>HDO</u> do not involve the minority controlled exception to the multiple ownership rules, they support the proposition that a substantial and material question exists when a licensee is under the actual control of another

In Metromedia, Inc., the Commission allowed an individual who was the company's president, chairman of the board, chief executive offier, who was also a director and stockholder, and who had been identified on forms filed with the Securities and Exchange Commission as the controlling party of the company to acquire *de jure* control of the company through the filing of a Form 316, rather than a Form 315.

entity.

31. Trinity's arguments concerning Metro are also misplaced. The Supreme Court did not hold that ownership without control would contribute to programming diversity. Likewise, the Commission did not divorce the concepts of ownership and control in its brief in that case. Instead, the Commission contended that minority ownership and control promote diversity. For example, the Commission's brief in Metro at p. 2 (Attachment 13 of Trinity's instant motion) states:

"This case involves the FCC's minority distress sale policy, which provides incentives for existing licensees, ... to sell a radio or television station to a *minority controlled* buyer. This policy, ... is one aspect of the agency's more general, and longstanding, efforts to increase diversity of ownership in broadcast stations. [fn omitted] The Commission has explained that it has been committed to the concept of diversity of *control* of broadcast stations.... (emphasis added)

Likewise, on p. 6, in explaining its beliefs at the time the distress sale policy was adopted, the Commission stated:

"The minority distress sale policy was based on the Commission's belief that "[f]ull minority participation in ownership and management of broadcast facilities results in a more diverse selection of programming..." quoting Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 FCC 2d 979, 981 (1978) (emphasis added)

It thus appears that the Commission expected a diverse selection of programming to occur when minorities actually controlled the station. There is no indication that the Commission expected that such diversity would occur if minorities were mere bystanders.

32. Considering all of the foregoing, the Bureau disagrees with Trinity that the <u>HDO</u> overlooked the obvious meaning and construction of the multiple ownership rules' minority

exception. As noted previously, the exception's definition of minority controlled was intended to inform an applicant what showing it needed to make in its application in order for a non-minority to acquire an interest in a 13th and 14th television station. The definition in no way negated the concept of *de facto* control nor did it give non-minorities any reason to believe that they could control the minority controlled stations. In this regard, Note 1 informed applicants that control was not limited to majority stock ownership but included actual working control in whatever manner exercised. The obvious meaning of this Note was that, in the context of the multiple ownership rules, the concept of control was not limited to *de jure* control but also included *de facto* control.

33. Finally, the Bureau also disagrees with Trinity that its treatment cannot be reconciled with the Commission's decisions in <u>Fox</u> and <u>Speer</u>. In <u>Fox</u>, the Commission exonerated the applicant of alleged deception because, although Fox failed to provide material information, it did not know that such information was material, and, thus, it did not have the requisite intent to deceive. <u>Fox</u>, 11 FCC Rcd at 7782. In <u>Speer</u>, FCC 96-258 at para. 75, the Commission determined, on the record before it, that Silver King had not intended to deceive the Commission. In Trinity's case, the law required that a non-minority could only acquire a cognizable interest in a 13th or 14th full power commercial station if minorities controlled those stations. The evidence, taken in its entirety, supports this view, and the <u>ID</u> found that Trinity and its counsel knew what the law was. Unlike the situation in the low power television service, nothing in any Commission pronouncement limited minority control of full power commercial broadcast stations to mere ownership. On the contrary, contemporaneous